No. 138, Original

IN THE

# Supreme Court of the United States

STATE OF SOUTH CAROLINA,

*Plaintiff,*

v.

STATE OF NORTH CAROLINA,

*Defendant.*

**On Bill of Complaint**

## DUKE ENERGY CAROLINAS, LLC'S REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE AND FILE ANSWER


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## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Duke Energy Carolinas LLP states that it is a wholly owned subsidiary of Duke Energy, Corporation. No publicly held company owns 10% or more of its stock.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

South Carolina's brief in opposition to Duke Energy Carolinas LLP's ("Duke's") motion to intervene rests on three false premises: (i) that Duke's interests are the same as those of any citizen utilizing the Catawba River; (ii) that Duke's interests in the River are cumulatively represented by North and South Carolina (even though those interests are clearly adverse to each other); and (iii) that Duke's interests are solely private and profit-maximizing and thus outside of the realm of interests relevant to the equitable-apportionment analysis. In fact, Duke's pervasive, controlling and wholly unique interests in the Catawba River waters arise from its Federal Energy Regulatory Commission ("FERC") License, which, along with its status as a public utility, ensures that Duke operates in the public interest as defined by federal law.

In addition, with reservoirs, customers, and legal rights and obligations in both North and South Carolina, Duke is *not* interested in maximizing the water available to *either* State. Its interest is in fulfilling the terms of its current FERC License and in ensuring the integrity of the Comprehensive Relicensing Agreement ("CRA") negotiated by Catawba stakeholders in both States – an Agreement that is critical to Duke's effort to obtain a new 50-year license from FERC and that requires Duke to act in the public interest in numerous respects.[1]

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[1] Portions of the massive CRA are appended to N.C.'s brief in opposition to the motion for leave to file bill of complaint. Duke would be glad to provide the document on CD or in hard copy if the Court wishes to review the entire document.

South Carolina's characterization of Duke as akin to any private user of the Catawba River is, accordingly, astounding. For more than 50 years, Duke has impounded water from the Catawba in 11 reservoirs located in North and South Carolina to provide hydroelectric power throughout the region. These impoundments regulate and determine the flow of the Catawba River. In times of drought, the natural flow of the Catawba would result in only a trickle of water reaching South Carolina. There would be *no water to apportion* absent Duke's FERC-licensed dams and reservoirs. See, *e.g.*, NC App. 13a, 14a-15a. South Carolina, accordingly, is seeking the apportionment not of the natural flow of the Catawba River, *but of waters available solely because they have been impounded by Duke's operation of its Catawba-Wateree project pursuant to the terms of a FERC license issued under the Federal Power Act* ("FPA"). Equally to the point, the FPA and Duke's FERC License require that Duke operate the project *in the public interest as defined by the federal government through FERC*. No other Catawba user and neither State has any remotely equivalent interest in the Catawba waters and their use in the public interest as defined by federal law.

These are precisely the unique circumstances that warrant intervention under this Court's precedent. Like the tribes permitted to intervene in *Arizona* v. *California*, 460 U.S. 605 (1983), Duke has interests that are unique, concrete, substantial and federal in nature, specifically the public interest requirements embodied in its license as mandated by the FPA and FERC. And, Duke's interests here are directly analogous to those of the oil pipeline companies permitted to intervene in an original action because the unconstitutional tax fell directly upon them, see

*Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). The equitable apportionment of the impounded waters of the Catawba has a direct effect on Duke and its operations, and Duke unquestionably should participate in developing, either through litigation or negotiation, any remedy imposed or approved by this Court. Duke's interest is unlike that of any other entity.

Finally, and in light of the foregoing, South Carolina's mantra – that this Court has never permitted a private party to *intervene* in an *equitable apportionment* case – is empty. There is nothing unique about apportionment cases. This Court is generally reluctant to allow private parties to intervene in original actions, which inherently involve sovereign functions. Nonetheless, the Court certainly has allowed parties other than States to join in equitable apportionment cases litigated under the Court's original jurisdiction. See *infra* at 14-16. What is important is not whether the issue arises as a matter of intervention or joinder, but rather whether the private parties' participation will advance the efficiency and effectiveness of the litigation under this Court's standards. Duke comfortably fulfills those criteria.

## ARGUMENT

### THIS COURT SHOULD GRANT DUKE'S MOTION TO INTERVENE

#### A. Duke's Interests Are Compelling, Unique And Unrepresented by Either State.

South Carolina spends several pages demonstrating that intervention by private parties in original actions is unusual, requiring the putative intervenor

to show "'some compelling interest in [its] own right apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by this state.'" Opp. 4 (alterations in original) (quoting *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953)). Duke has no quarrel with this standard, but it has clearly made the required showing.

Duke is not equivalent to "'[l]arge industrial plants'" or to a municipality located in a single state, or to other individual claimants within states seeking special recognition for their particular uses, as South Carolina insinuates (Opp. 3 (alteration in original)). Duke's interests in the Catawba, indeed, are exceptional even among FERC licensees. The Catawba-Wateree project is massive, including 11 reservoirs and numerous hydroelectric facilities throughout the River basin that runs through two States. And, Duke plainly is not just a very *large* user, as South Carolina implies. The very nature of its use and interest is both unique and uniquely important.

### 1. Duke's Obligations To Serve The Public Interest In Numerous Respects Arise From Its Status As A Federal Licensee.

South Carolina acknowledges that under the FPA, FERC is obligated to consider a broad array of public interests in issuing a license. Opp. 5. But, South Carolina insists, this is of no relevance to Duke, which "has no such duties" and acts based solely on its "own profit-making incentives." *Id.* South Carolina wholly misapprehends the relevant statutory and regulatory regime and the obligations it imposes on Duke. Federal law imposes specific public-interest obligations on Duke as a FERC

licensee, including obligations that pertain directly and substantially to Duke's management of the flow of the Catawba.

Under § 4(e) of the FPA, FERC is authorized and empowered to issue licenses, including licenses for dams, reservoirs, and other projects for the development of power from streams and other bodies of water. In doing so, the Commission, "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . , the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). See also §§ 803(a)(1); 808(a); *Udall* v. *FPC*, 387 U.S. 428, 450 (1967) (FERC must determine whether a hydroelectric project will be in the public interest as a whole).

To implement this statutory mandate, FERC includes within its licenses numerous conditions and requirements that the licensee serve the public interest as defined by FERC. The FERC licensee, in turn, is bound by the FPA and by the terms of its FERC license. See *Alabama Power Co.* v. *FPC*, 128 F.2d 280, 293 (D.C. Cir. 1942) ("the grant of [the license] may be made subject to conditions appropriate to safeguard the interest of the public. Having received its license subject to such conditions, . . . the Company cannot shuck off its obligations as a licensee . . . .") (footnote omitted). See also 16 U.S.C. § 799 ("[e]ach such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter . . . which said terms and conditions and the acceptance thereof shall be expressed in said license").

As § 10 of the FPA mandates:

> All licenses issued under this subchapter shall be on the following conditions:
>
> . . . That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title . . . . [16 U.S.C. § 803(a)(1) (emphasis supplied).]

See also 18 C.F.R. § 4.34 (FERC licenses issue upon the conditions of 16 U.S.C. § 803 and other conditions deemed to be in the public interest).

The FPA's re-licensing requirements underline the fundamental nature of the licensee's public interest obligations. FERC is specifically instructed to consider "the actions taken by the existing licensee related to the project which affect the public" in deciding whether to issue a new license. 16 U.S.C. § 808(a)(3)(B). See also 18 C.F.R. § 16.8 (applicants for a new license must consult with numerous state and federal agencies); *id.* § 16.13(a) (indicating that FERC must determine whether a new license proposal is "best adapted to serve the public interest"); *id.* § 5.29(h) (restating that a license will issue on terms that promote the public interest).

Finally, as a further manifestation of a FERC licensee's duty and right to act in the public interest, the FPA authorizes FERC licensees to exercise the power of eminent domain over privately owned land necessary for the operation or construction of a FERC-licensed project. See 16 U.S.C. § 814. Clearly, an express statutory authorization to exercise the power of eminent domain to serve federal public interest purposes is not possessed by any other, let alone every other, entity with an interest in the Catawba River.

This regulatory scheme is a complete answer to South Carolina's assertion that Duke operates solely as a profit-maximizing entity. There are numerous terms in Duke's current license and in the CRA that mandate that Duke take actions that serve the public interest, rather than maximize profit. See, *e.g.*, *Duke Power Co.*, 20 F.P.C. 360, 361 (1958) (Duke's current license) ("[t]he Secretary of the Interior . . . recommended for inclusion in any license issued certain conditions in the interests of fish and wildlife resources and public enjoyment of such resources, and for archeological salvage in the area to be inundated by the proposed . . . development, all as hereinafter substantially provided").[2] See also, *e.g.*, CRA § 6 (establishing Duke's obligations during drought or low flow, known as the "Low Inflow

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[2] *See also Duke Power*, 20 F.P.C. at 361 (stating that several North Carolina agencies had recommended provisions and negotiated with Duke agreements "with respect to minimum water releases and establishing public recreation areas as hereinafter provided"); *id.* (stating that the South Carolina Board of Health had "recommended for inclusion in any license issued a condition respecting minimum daily flow releases as hereinafter provided"); *id.* at 371, Art. 30 (mandating provision of free recreational areas and minimal water releases to serve "beneficial public uses").

Protocol"); *id.* §§ 9.2.2, 9.2.3, 9.2.5 (Duke's responsibility for monitoring, protecting and promoting culturally and historically relevant artifacts, flora and other properties); *id.* § 10 (Duke's obligations to make flow releases to allow and protect recreational uses, to construct additional recreational facilities); *id.* § 14.5 (Duke's obligation to provide North and South Carolina agencies with more than $9 million to support land purchases for conservation and public recreation upon issuance of a new license).

In light of this federal scheme and the particular licensing obligations imposed on Duke that directly affect the Catawba flow, South Carolina is simply wrong to contend that Duke is no different from other users of the Catawba. And, Duke's argument is not that it represents the federal government, see Opp. 5; nor is Duke required to meet this standard in order to intervene. Duke's point is that federal law imposes on it rights and obligations to act in the public interest, and therefore that its rights and obligations with respect to the Catawba are both compelling and unique.

South Carolina claims that Duke's preferred equitable apportionment will be based solely on its profit-maximizing interests, Opp. 5, and that this "may not serve the varied needs of both States' citizens well in the long run," *id.*

As South Carolina well knows, this statement is utterly inconsistent with the 70-party negotiation (including numerous governmental entities in North and South Carolina) that recently resulted in the CRA – the terms of which all parties agreed represented a fair accommodation of all relevant public and private interests in the Catawba. It is this consensus determination about the Catawba that Duke seeks to defend and represent, rather than the

interest of either State in maximizing its own apportionment. Indeed, Duke's position serves and furthers the strong FERC policy favoring the settlement of issues related to the licensing of FPA projects. See *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 71 Fed. Reg. 56,520, 56,521 (Sept. 27, 2006) (policy statement) ("Commission looks with great favor on settlements in licensing cases").[3]

In any event, the Court will benefit from the involvement of Duke in order to fully air the federal issues at stake in the litigation. This is particularly so in light of the fact that the possibility of apportionment exists almost entirely because of Duke's federally-licensed project on the Catawba. During times of drought, were it not for the waters impounded by Duke in North Carolina, there would be *very little water available* for flow into South Carolina. In a very real sense, it is only Duke and its federal license that make both the existence of this case and any remedy possible.

As an impounder of water, Duke has concrete interests in that water – interests of ownership and management – that are determined and regulated by federal and state law. In addition, as a public utility Duke is obligated by state law to serve the public interest. See, *e.g.*, N.C. Gen. Stat. § 62-2(a); S.C. Code Ann. §§ 58-4-10; 58-1-65(A)(2). Any equitable apportionment of the Catawba will necessarily consider, address and affect Duke's many interests in

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[3] *See also Erie Boulevard Hydropower, L.P.*, 120 FERC ¶ 61,267, at 62,187 (2007) ("policy of encouraging settlement agreements in hydroelectric licensing proceedings"); *Alcoa Power Generating, Inc.*, 110 FERC ¶ 61,056, at 61,271 (2005) (same).

the River, as the federal common law applied by this Court sorts through the relevant interests, current uses and applicable laws. See *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (equitable apportionment turns on "consideration of the pertinent laws of the contending States and all other relevant facts").[4]

Only Duke among the parties will be concerned with the relationship between the FPA and its regulations and the federal common law governing equitable apportionment. Only Duke has a compelling set of rights and interests to protect arising from its status as a federal licensee and public utility in both States.

### 2. Duke's Interests Are Not Represented By Either Or Both States.

South Carolina also claims that North Carolina already represents the federal interests that Duke seeks to intervene to protect. Opp. 6. For this, South Carolina first cites Duke's request to intervene as a defendant. This indicates only that Duke opposes any equitable apportionment that does not take into account its interests as a FERC licensee, license applicant, and impounder of water. It does not

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[4] South Carolina completely misunderstands the import of Duke's citation of the North Carolina law giving impounders of water interests in the impounded water. Opp. 9. That property interest alone does not create a right that supports intervention; nor did Duke suggest that it "trump[s] the federal common law of equitable apportionment." *Id.* But, the state law is clearly relevant to the equitable apportionment analysis; in combination with Duke's other interests and obligations as a FERC licensee, Duke is uniquely suited to assist the Court and to protect the public interest obligations it must assume as a matter of federal and state law.

indicate, as Duke's prayer for relief in its Answer makes clear, that Duke seeks to maximize North Carolina's portion of the Catawba's waters or that Duke opposes any particular equitable apportionment (other than those inconsistent with the terms of the CRA).

South Carolina makes much of North Carolina's citations of the CRA. But North Carolina cited those provisions, and their proposed protection of certain minimum flows into South Carolina, as a reason for this Court to deny the motion for leave to file a bill of complaint (because the CRA would provide South Carolina with adequate flow). North Carolina certainly did not characterize the CRA as the correct resolution of any equitable apportionment case. North Carolina may seek to maximize its portion, as South Carolina surely will.

This, in turn, may endanger the negotiated solution embodied in the CRA. Duke's interests cannot be represented by either State seeking to maximize its own portion at the other's expense. Duke has reservoirs, public and private interests, customers and regulators in both States. Duke's position is that whatever equitable apportionment is ordered, the terms of the CRA – the product of a three-year process in which participants moved away from seeking simply to maximize their own positions and toward an acceptable compromise – should be protected so that Duke can continue to operate in the public interest in the Catawba basin. Neither State represents this amalgam of interests.[5]

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[5] Duke is unsure of the significance of South Carolina's assertion that there is no current dispute over the meaning of the CRA. Opp. 7. Duke agrees. The point is that neither State will necessarily protect or even have regard for Duke's interest

South Carolina next contends that the fact that Duke has reservoirs in both States is irrelevant – *i.e.*, that Duke's interests can nonetheless be protected by those States. Opp. 7. But this contention ignores the undisputed facts. Duke is not interested in maximizing the respective portions of either its North Carolina reservoirs or its South Carolina reservoirs as the States are. Instead, Duke is concerned with the overall system, its efficiency and service of the public interest on the terms provided in Duke's current and future federal licenses. It does not serve Duke's interests if its North Carolina reservoirs are full and its South Carolina customers suffer. In fact, the CRA represents the negotiated compromise of diverse interests that seeks to balance the needs of those in both States. And, as noted above, Duke has deep connections and interests in both States that must be reconciled and that are – in light of their interstate nature and the governing federal statute and regulation – considered federal.

That is why South Carolina's citation of *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), see Opp. 8-9, is wholly inapt. Indiana was deemed to represent the interests of all its citizens in the building of a bridge to Indiana, and thus its position that the bridge should

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in defending the CRA, now that this Court is addressing equitable apportionment.

Similarly, Duke agrees that the CRA does not resolve the water rights dispute between North and South Carolina. Opp. 6. Duke seeks, however, to ensure that the federal interests reflected in its current license and, potentially, in the CRA are recognized and protected in any equitable apportionment. It is for this Court to determine the relationship between the FPA and its regulations and the federal common law of equitable apportionment. Unlike either State, Duke has a strong interest in ensuring that FPA-related interests are incorporated and protected in any equitable apportionment analysis.

be built was dispositive and binding on its citizens. For purposes of this analogy, Duke is akin to a person who is a citizen of both Kentucky and Indiana and who has a federal contract requiring him to build the bridge. Duke's interests differ from those of other water users not simply "as a matter of scale," Opp. 10 (though the scale of Duke's interests is unmatched by any other user and gives rise to the ability to apportion water that is at stake in this litigation). Both the nature and federal source of its interests set Duke apart.

As the foregoing makes clear, Duke's peculiar interests, if recognized by this Court, could not conceivably open this case to intervention by significant numbers or, indeed, any other private parties. No one is similarly situated or possesses analogous interests. South Carolina's argument that the motion to intervene by the Catawba River Water Supply Project demonstrates that the floodgates are open, see Opp. 10, is entirely unpersuasive. The filing of a motion does not demonstrate its merit – and the filing of a single motion is not even a trickle, much less a flood.

In sum, Duke's interests, arising from its status as a FERC licensee and a current applicant for a new FERC license and its massive impoundments of water, are compelling and unique. Those interests are not represented by either party State.

### B. South Carolina's Attempt To Distinguish Applicable Precedent Is Unavailing.

South Carolina's attempts to distinguish this Court's principal authorities concerning intervention in original actions serve only to highlight the strong case for intervention here.

In *Arizona* v. *California*, this Court authorized tribes with affected property interests to intervene in an equitable apportionment action. See 460 U.S. at 615. South Carolina says that the intervention was allowed "only because the Tribes are afforded special protections under federal law." Opp. 11. This is not the only reason that intervention was permitted. See 460 U.S. at 614-15 ("[t]he Tribes' interests in the waters of the Colorado basin have been and will continue to be determined in this litigation"). More importantly, Duke is in a position directly analogous to that of the Tribes – it has special rights and obligations under federal law. See *supra* at 4-9. And, unlike the Tribes, which were already represented by the United States at the time they intervened, see 460 U.S. at 615, no party represents Duke's interests.

In *Maryland* v. *Louisiana*, this Court authorized intervention by 17 pipeline companies in original litigation concerning the constitutionality of Louisiana's "first use" tax on out-of-state exporters of natural gas brought into Louisiana. See 451 U.S. at 745 n.21. South Carolina first claims that this case is not on point "[b]ecause the tax was imposed directly on the pipelines," and thus "the pipelines had an interest in invalidating the tax that was independent of the interest and authority of the plaintiff States." Opp. 12. But Duke is in precisely the same situation as the taxed pipelines. Just as the tax at issue was imposed directly on the pipelines, heightening their interest and warranting intervention, any equitable apportionment in this case will require Duke's implementation and will affect Duke's management of the waters it impounds pursuant to state law and its FERC license. The effect is even more direct and pronounced than the effect of the tax on the pipelines; indeed, Duke may be directly implementing whatever

equitable apportionment is ultimately ordered. In those circumstances, it surely should be permitted to participate as a party in the proceedings leading to such an order.

South Carolina also argues that *Maryland* v. *Louisiana* is distinguishable because it did not involve equitable apportionment. Opp. 12. The assertion appears to be that unconstitutional taxation is a lesser infringement on sovereignty than equitable apportionment, and therefore that intervention should be more easily allowed. South Carolina not surprisingly cites no case for this proposition, because it has no basis in this Court's analysis of intervention generally.[6]

In a related argument South Carolina asserts repeatedly that this Court has never allowed intervention of a private party in an equitable apportionment case (treating the Tribes in *Arizona* v. *California* as more analogous to a governmental entity than to a private party). Again, South Carolina suggests no basis for treating the joinder of parties differently in equitable apportionment cases than in other inter-state disputes involving questions of sovereign authority. In any event, this Court has allowed non-States, including private parties, to participate in equitable apportionment actions, albeit with joinder achieved by means other than intervention.

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[6] South Carolina also argues that intervention was permitted in *Maryland* v. *Louisiana* in part because only 17 pipelines were involved, while Duke's intervention would open the floodgates. Opp. 12. We showed *supra* that this is wrong. Moreover, any motion to intervene filed now could be rejected as untimely given the motions that already have been filed.

*Colorado* v. *Kansas*, 320 U.S. 383 (1943), was filed roughly two decades after Kansas unsuccessfully sued Colorado over the equitable apportionment of the Arkansas River. *Id.* at 384-88. Colorado sued Kansas and joined a Kansas water users' association, seeking to enjoin that association from prosecuting water adjudication suits in Colorado against private parties appropriating water in that State. *Id.* Likewise, in *Arizona* v. *California*, 373 U.S. 546 (1963), Arizona filed suit to determine the respective States' shares of Lower Colorado River Basin water under the Boulder Canyon Project Act, and joined as defendants a number of public agencies which had water delivery contracts with the Secretary of the Interior. *Id.* at 551-52 & n.2, 561-62. In both cases, the plaintiff State named defendants in addition to the opposing state. There is no special or heightened bar for party status generally and intervention specifically in equitable apportionment cases.

Finally, South Carolina claims that cases like *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), allowing the intervention of affected property rights holders in boundary disputes between states, can be explained by the fact that, absent joinder, it was unclear whether private parties were bound by the outcome of original actions. Opp. 13. There is no hint of this rationale in the Court's subsequent intervention decisions in *Maryland* v. *Louisiana* and *Arizona* v. *California*. Instead, the requirement is that the putative intervenor demonstrate a compelling interest not adequately represented by a party state – a test Duke has fully satisfied.[7]

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[7] The water rights treatise that South Carolina cites for this reading of *Oklahoma* v. *Texas*, *see* Robert E. Beck et al., *Water and Water Rights* (1991 ed., 2004 replacement vol.) explains that "individual water claimants" generally are not joined in

### C. Duke's Interests Warrant Party, Not *Amicus*, Status.

South Carolina last makes the straw man argument that Duke's relevant knowledge and expertise – here undisputed – are not sufficient to confer intervenor status. Opp. 13. As South Carolina is fully aware, Duke pressed no such contention. Duke rests on the full set of interests articulated in its motion and above, adding that its party (as opposed to third-party) status will facilitate its production of relevant expertise and knowledge.[8] Far from complicating or protracting the discovery process and factual development, Duke's presence – without the need for third-party subpoena and scheduling – will expedite and streamline this litigation.

In addition, Duke's party status is essential to the formulation of any remedy in this action. Duke manages the impounded water that will allow apportionment. And, with respect to any remedy, Duke is bound by its federal license and the interests it is obligated to serve.

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equitable apportionment actions. *See* Opp. 13 n.3. This is neither Duke's argument, nor an accurate characterization of Duke's status.

[8] Notably, although Duke's application for a new license is pending, certain portions of the CRA, which is also a contract among the signatory parties, have already become effective and impose obligations on the parties. *See, e.g.*, CRA §§ 5.8.2 (cumulative water use), 5.10.1 (formation of Water Management Group), 6.6 (Drought Response Plan Updates), 14.5.3.3 (financing of state agencies for land acquisition), 15.6.1 (development of groundwater monitoring plan by 12/31/07 for inclusion in LIP). In addition, the current License will be renewed annually until a new license issues.

To appear reasonable, South Carolina points out that Duke could appear as an *amicus*; but given the intimate role that Duke should play in any final determination of this litigation, *amicus* status is inadequate. The ability to file briefs on the basis of a record that Duke has no ability to shape simply risks ignoring Duke's interests and impairing both the litigation of the merits and the proper remedy of the claim at issue.

## CONCLUSION

Duke's motion for leave to intervene and file an answer should be granted.

Respectfully submitted,

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